

**BUSINESS FRANCHISE LICENCES (TOBACCO)
AMENDMENT BILL 1989**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The Business Franchise Licences (Petroleum Products) Amendment Bill 1989 and the Revenue Laws (Reciprocal Powers) Further Amendment Bill 1989 are cognate with this Bill.

The object of this Bill is to amend the Business Franchise Licences (Tobacco) Act 1987—

- (a) to provide a procedure whereby tobacco that is taken into custody because it is being transported without the appropriate transportation record required by the Act can be forfeited to the Crown unless the correct transportation record is provided;
- (b) to require a transportation record to be in writing and to clarify the details that it must provide;
- (c) to create the offence of failing to produce the required transportation record;
- (d) to allow the Chief Commissioner to elect to treat tobacco that is seized because it is transported without the required transportation record as having been seized as evidence of an offence;
- (e) to update provisions concerning objections and appeals against the Chief Commissioner's assessment of licence fees and to provide for an appeal to the Supreme Court;
- (f) to clarify the operation of a provision that deems certain sales of tobacco made outside the State to have been made in the State;
- (g) to extend the meaning of "sell" in the context of certain offences under the Act to include, among other things, have in possession, custody or control for sale;
- (h) to revise the provision dealing with the presumption that possession of commercial quantities of tobacco gives rise to, so that a person possessing a commercial quantity shall be presumed to possess it for sale and to be in the business of tobacco wholesaling;

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- (i) to make it an offence with a maximum penalty of \$2,000 for a licensee under the Act to fail to inform the Chief Commissioner of a change in the particulars of the licensee;
- (j) to provide that the Chief Commissioner may elect to excuse late payment of a licence fee, such a payment then being regarded as having been made on time;
- (k) to omit the provision which prevents the seizure of tobacco thought to be evidence of an offence against the Act if it is in the possession of the driver of a road vehicle;
- (l) to simplify the procedure for authorising the sale of seized tobacco and payment of the proceeds into court pending the outcome of proceedings;
- (m) to clarify the evidentiary effect of notices of assessment and certificates issued under the Act;
- (n) to authorise a court to convict a person of an offence under the Act even though it is not the offence for which the person is prosecuted;
- (o) to authorise the Chief Commissioner to set off amounts payable by a person under the Act (such as licence fees) against any amount (including damages) that the Chief Commissioner may be liable to pay the person under the Act;
- (p) to make other minor or consequential amendments and to enact transitional provisions.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act commences on a day or days to be appointed by proclamation.

Clause 3 gives effect to the Schedule of amendments to the Principal Act.

SCHEDULE 1—AMENDMENTS

Transportation records and forfeiture of seized tobacco

Schedule 1 (16), (17) and (18) enact provisions under which tobacco that is seized because it is transported without the required transportation record can be forfeited to the Crown. Currently such tobacco is held until the required record is produced.

Under the new provisions, the Chief Commissioner will publish a newspaper notice inviting claims by persons who are entitled to the seized tobacco. A claimant must furnish the correct transportation record or the claim can be rejected. Claims will then be considered and the tobacco returned to the person entitled to it (so long as the correct transportation record is furnished). A person dissatisfied with the Chief Commissioner's decision can apply to the Supreme Court. If no claim is made or all claims are unsuccessful, the Chief Commissioner can forfeit the tobacco to the Crown.

Schedule 1 (15) requires the transportation record to be in writing and requires that it state (in addition to the matters currently required to be stated) the name and address of the tobacco's owner and of the person who has agreed to buy it. It will also be an offence (maximum penalty \$2,000) to fail to produce the required transportation record on demand.

Schedule 1 (10) allows the Chief Commissioner to treat tobacco seized because of a failure to produce the required transportation record as being evidence of an offence. This allows the Chief Commissioner (under the current provisions of the Act) to keep the tobacco until proceedings for the offence are disposed of and to apply to a court for its forfeiture if the offence is established.

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Objections and appeals

Schedule 1 (8) updates provisions dealing with objections and appeals against licence fee assessments under the Act. Currently, a person can object to the Chief Commissioner against an assessment and then appeal to the Business Franchise Licence Fees (Tobacco) Appeals Tribunal if dissatisfied with the decision on the objection.

Under the new provisions, the time within which an objection can be lodged is increased from 1 month to 60 days and there is provision for this time limit to be extended for reasonable cause. A dissatisfied objector can appeal to the Tribunal (as is currently the case) or can appeal directly to the Supreme Court. In either case the appeal cannot proceed unless the objector has given the Chief Commissioner the information requested in connection with the matter. Following an appeal to the Tribunal, either the appellant or the Chief Commissioner can appeal to the Supreme Court if dissatisfied with the Tribunal's decision. If the objector is successful before the Tribunal or the Supreme Court, the Chief Commissioner is required to pay interest on any licence fee that was overpaid.

Sales outside the State

Schedule 1 (1) substitutes the provision dealing with sales of tobacco made outside the State. Under the new provision a sale made outside the State will be considered to have been made in the State if it is made in the course of tobacco wholesaling or retailing and the terms of sale require or contemplate delivery into or within the State.

Extended meaning of sell

Schedule 1 (3) inserts a definition that extends the meaning of "sell" in the context of offences concerning sales of tobacco by unlicensed persons. The term will include, among other things, have in possession, custody or control for sale and send, forward, deliver or receive for sale.

Possession of commercial quantities

Schedule 1 (4) requires it to be presumed that a person who has possession, custody or control of a commercial quantity of tobacco has it for sale and is carrying on tobacco wholesaling. The current provision requires only that the person be presumed to have it in possession for sale.

Failure to notify changed particulars

Schedule 1 (5) makes it an offence for a licensee to fail to inform the Chief Commissioner of a change in such matters as the address of the licensee's place of business and the name of the licensee's supplier. The maximum penalty will be \$2,000. Currently a failure to notify results in the licensee not being granted a new licence.

Late payment of licence fees

Schedule 1 (6) allows the Chief Commissioner to accept late payment of a licence fee so that late payment will not result in the licensee being unlicensed. The Chief Commissioner may charge a penalty fee for late payment up to twice the licence fee owing.

Seizure from road transporters

Schedule 1 (9) omits the provision which prevented the Chief Commissioner from seizing tobacco believed to be evidence of an offence if it was in the possession of the driver of a road vehicle. Tobacco transported by road vehicle will thus not be afforded immunity from seizure.

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Sale and return of seized tobacco pending prosecution

Schedule 1 (11) removes the requirement for the Chief Commissioner to give evidence of tobacco wholesaling or retailing before tobacco that is held as evidence of an offence can be ordered to be sold pending proceedings for an offence. The current requirement that the proceeds of sale are to be paid into court pending proceedings for the offence remains unchanged.

Schedule 1 (13) makes it clear that the Chief Commissioner is protected from liability when tobacco that is seized as evidence of an offence is returned to the person apparently entitled to it, as authorised by the Act.

Evidentiary matters

Schedule 1 (19) and (20) make it clear that evidentiary certificates and notices of assessment issued under the Act are evidence in any proceedings (not just proceedings under the Act, as at present).

Alternative verdicts

Schedule 1 (21) provides that, in a prosecution for an offence concerning the sale of tobacco by an unlicensed person, the court can convict for a different offence if satisfied that the other offence has been committed (even though it might not be satisfied that the actual offence charged has been committed).

Set off by Chief Commissioner

Schedule 1 (22) authorises the Chief Commissioner to discharge any liability of the Chief Commissioner to a person in connection with tobacco licensing (for example, a liability to pay damages in proceedings for the recovery of seized tobacco) by discharging any liability of the person to pay licence fees and other amounts payable under the Act.

Transitional provisions

Schedule 1 (23) inserts transitional provisions consequent on the proposed Act. The new provisions for the forfeiture of seized tobacco to the Crown will apply to tobacco already in custody when the proposed provisions commence. The new objection and appeal provisions will apply to an objection made before they commenced unless an appeal to the Tribunal in respect of the objection has already been determined or is out of time.

Minor and consequential amendments

Schedule 1 (2), (7), (12) and (14) make minor or consequential amendments.
